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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MARK ZELAZEK,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

PETITION FOR WRIT OF CERTIORARI

TIMOTHY J. JOYCE
53 West Jackson Boulevard
Suite 1560
Chicago, Illinois 60604
(312) 786-1221

Counsel of Record
for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

3588

QUESTION PRESENTED FOR REVIEW

Whether Illinois' statutory scheme authorizin*g* verdicts of guilty but mentally ill in cases where a defendant raises the defense of insanity violates due process where there is no meaningful distinction between "guilty" and "guilty but mentally ill."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mark Zelazek, prays for a Writ of Certiorari to review the judgment and order of the Illinois Appellate Court, First Judicial District, which was entered on October 19, 1998.

OPINIONS BELOW

The order of the Illinois Appellate Court, First Judicial District, affirming Petitioner's convictions and sentence of natural life imprisonment was entered on October 19, 1998. That order is not officially reported, but was entered in an order pursuant to Illinois Supreme Court Rule 23(b), Ill. S. Ct. R. 23(b), which order is reproduced in Appendix A of this Petition. That court denied rehearing on November 25, 1998.

Petitioner petitioned the Illinois Supreme Court for leave to appeal. That court denied such on June 2, 1999. A copy of that order is reproduced in Appendix B of this Petition.

STATEMENT OF JURISDICTION

The order and judgment of the Illinois Appellate Court was entered on October 19, 1998. The Illinois Supreme Court denied leave to appeal on June 2, 1999. No petition for rehearing was filed. This Petition for a Writ of Certiorari is filed within 90 days of that order as required by Rule 13(1) of the Rules of this Court. The decision of the Illinois Appellate Court was explicitly based upon federal Constitutional law, in particular the Fifth Amendment. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution.

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall be private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner, Mark Zelazek, was charged with first degree murder in connection with the deaths of Connie Nagel and Raymond Wolendowski (R. C 146) Petitioner, then a 36-year-old man, lived at home with his elderly mother, worked as a high school basketball statistician, and had never previously been arrested. (R. 447-58). He met the decedents, whom he did not know previously, after going to a tavern following a high school basketball game during the evening of February 5, 1994, into the morning of February 6. (R. 416-17). Ms. Nagel and Mr. Wolendowski were intoxicated, and at one point that evening Ms. Nagel bared her breasts and buttocks inside the tavern. (R. 418). Petitioner thereafter followed the decedents to Ms. Nagel's home in Dolton, Illinois, a suburb south of Chicago. (R. 54, 78-79).

Once inside that home Ms Nagel and Mr. Wolendowski were killed in an especially brutal manner. Ms. Nagel sustained two lethal wounds: one was a stab wound to her left lung, the other was inflicted by strangulation. (Supp. R. 160-62). A piece of electrical cord found at the scene was consistent with the ligature marks around her neck. (Supp. R. 161-62). She also suffered also suffered 25 stab and incised wounds to her left chest alone, similar wounds to her face, and bruises and abrasions to her head and back, two of which were in excess of six inches in length. (Supp. R. 151).

Mr. Wolendowski also suffered numerous stab and incised wounds about his face and head, abrasions to his head and back, bruises to his torso and numerous defensive wounds to his arms. (Supp. R. 128-32, 187-88). The killing wounds, however, were a massive blow to the back of his head (consistent with a blood-stained half-gallon vodka bottle found at the scene), and an incised wound to his right wrist which cut through the radial artery almost to the bone. (Supp. R. 131-24, 148-49). The medical examiner testified further that she had never before seen that type of wound, despite having performed over 300 autopsies in homicide cases. (Supp. R. 191-92).

On the evening after the homicides, Petitioner presented himself at the Dolton Police Department, even though the police were not seeking to interview him, because, he claimed, he was supposed to have met Mr. Wolendowski at the same tavern. When Mr. Wolendowski did not arrive, Petitioner learned that he had been murdered and "came to the police station to help." (R. 225). Petitioner claimed further that he did not see the decedents after they left the tavern, and thereafter left the police station. (R. 225).

After learning that Petitioner had left the tavern with the decedents, the police went to his home in Chicago that same evening, and asked him to return to their station. (R. 228-29) Petitioner denied any knowledge of the homicides, but a search of his car turned up two of Ms. Nagel's credit cards. (R. 230-34). Petitioner was confronted with that discovery and thereafter admitted killing the decedents. (R. 236). During several interviews with police, Petitioner stated that after he refused an offer of a drink, Ms. Nagel and Mr. Wolendowski "teased" him. (R. 255). When Ms. Nagel had her back to Petitioner, he took two credit cards off the counter and put them in his pocket. (R. 255). Although the subject of such was not elicited by the prosecution's evidence, the State claimed that an argument then began, during which time Petitioner stabbed Ms. Nagel. (R. 255). When she ran from him toward her bedroom, he swung the knife at Mr. Wolendowski, who stumbled over a coffee table in the living room. (R. 255). Petitioner then ran into a bedroom and stabbed Ms. Nagel "a couple of more times." (R. 255). He then grabbed another knife in the kitchen, and a vodka bottle, and stabbed Mr. Wolendowski after striking him in the head with the bottle. (R. 255). Ms. Nagel then entered the living room, was stabbed again in the chest, and ran back into the bedroom where Petitioner stabbed her again. (R. 255). He then returned to the living room and again stabbed Mr. Wolendowski, following which he returned to the bedroom "where he finished stabbing" Ms. Nagel. (R. 255).

A five-page written statement was prepared by a Cook County Assistant State's Attorney who was present for the interview of Petitioner, which Petitioner signed. (R.

256). That prosecutor claimed that Petitioner was asked why he attacked the decedents, but Petitioner refused to answer, although that claim was never documented in the written statement, any police reports, or a memorandum prepared by the prosecutor. (R. 381-82).

However, at a pre-trial motion to suppress Petitioner's statements, the only other witness to Petitioner's "confession," Dolton Police Sergeant William Dodaro, volunteered:

> The [Petitioner] was telling us that they were taunting him because they wanted him to drink. He didn't want to drink. They were teasing him. They were pinching him. He stated that they tried to get him into sexual thing. They accused him of being gay, things of that nature. R. 276

This statement was never otherwise documented, and was denied by the prosecutor, who was present at the same interviews with Dodaro at all relevant times. (R. 359-60)

Prior to that revelation, Petitioner had claimed to three expert forensic witness that his actions in killing the decedents were motivated by fear in the face of a sexual assault by the decedents. Petitioner related that Ms. Nagel made an overt sexual advance to him, in Mr. Wolendowski's presence, and that when he attempted to leave, both began touching him, saying such things as: "Are you one of those boys that was born without a dick?"; "Maybe he's a fag and wants me"; "Look, Connie, he's got tits just like a girl." (R. 477, 610, 696-710). Even after Petitioner picked up a knife, Mr. Wolendowksi grabbed Petitioner's wrist and Ms. Nagel sought to remove his pants. (R. 479-80). Petitioner then pushed Ms.

Nagel away and was grabbed or hit in the head by Mr. Wolendowski, and then a violent struggle ensued, during which Petitioner recalled being hit as well as stabbing. (R. 610-11).

Further evidence established that when Petitioner was 14 years old it was discovered that he had the penis of a seven-year-old. (R. 448). That condition was treated with hormones, the only effect of which was to enlarge his breasts. (R. 448-49). He was taunted and ridiculed as a teen, including an incident where he was beaten so badly that his appendix and gallbladder ruptured. (R. 448-49). Following his arrest for this incident, he was diagnosed in Cook County Jail as suffering from testicular contusions. (R. 882).

Those experts testified that Petitioner suffered "brief psychotic disorder," "brief psychotic rage," or "sexual panic" (R. 493, 615-16, 711-12). All opined that as a result of that mental disease or defect, Petitioner lacked capacity to conform his conduct to the requirements of the law and was therefore insane. (R. 512-15, 624, 712-14). The prosecution presented the opposing testimony of two psychiatric witness who claimed that Petitioner was sane. (R. 818, 909).

Following the presentation of evidence, the prosecution requested that the jury be instructed as to, and be provided with verdict forms for, "guilty but mentally ill." (R. 995). Petitioner objected on the grounds that such violated the constitutional guarantees of due process and equal protection. (R. 995-96). Over objection, the trial judge so instructed the jury, who received the following forms of verdict as to each decedent: "not guilty," "not

guilty by reason of insanity," "guilty but mentally ill," and "guilty."

During deliberations the jury sent the trial judge the following note: "What happens to a Defendant if he is found not guilty by reason of insanity? No. 2, What happens to the Defendant if he is found guilty with a mental illness [sic]?" (R. 1187). The trial judge responded: "You are not to concern yourself with possible punishment or sentence for the offense charged during your deliberations. Conversely, you are not to concern yourselves with what happens to the Defendant if he is found not guilty by reason of insanity. It is the function of the trial judge to determine the sentence should there be a verdict of guilty." (R. 1201-02).

On the next day the jury returned verdicts of guilty but mentally ill. (Supp. R. 3-4). Following polling of the jury, the foreperson stated; "On behalf of my 11 fellow jurors, we request that this Defendant receive the assistance he needs for his problem." (Supp. R. C6).

Petitioner was thereafter sentenced to natural life in the penitentiary without parole. (Supp. R. C113).

REASONS FOR GRANTING THE WRIT

THE PRESENT ISSUE HAS BEEN LEFT UNRESOLVED BY THIS COURT IN AN IMPORTANT AREA OF CONSTITUTIONAL LAW THAT IMPACTS VIRTUALLY EVERY INSANITY CLAIM IN AT LEAST THIRTEEN STATES.

The concept of "guilty but mentally ill" first appeared in this country in the State of Michigan in 1975. Following the verdict of not guilty by reason of insanity in a

case involving on attempt on President Ronald Reagan's life, other states enacted similar legislation. *See*, Comment, *The Guilty but Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 341, 34-45 (1996). To date, thirteen states have enacted legislation establishing the concept of guilty but mentally ill. *Neely v. Newton*, 149 F. 3d 1074, 1079 (10th Cir. 1998).[1] In 1986 this Court denied, by summary affirmance, a constitutional challenge to Michigan's statutory scheme. *Hardesty v. Michigan*, 477 U.S. 902 (1986). Since that time state and federal courts of review have generally upheld guilty but mentally ill statutes in the face of constitutional challenge, but the plethora of dissenting opinions as well as other criticisms present this Court with a perfect vehicle to visit and resolve an important issue that recurs automatically in virtually every criminal trial where insanity is raised in each of those thirteen states. *See*, *e.g.*, *State v. Neely*, 112 N. M. 702, 819 P. 2d 249 (1991); *Mitchell v. Commonwealth*, 781 S.W. 2d 510 (Ky. 1989); *People v. Ramsey*, 422 Mich. 500, 375 N.W. 2d 297 (1985);

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[1] Those thirteen states are: Alaska, Alaska Stat. sec. 12.47.030; Delaware, Del. Code Ann. Tit. 11, sec. 401(b); Georgia, Ga. Code Ann. sec. 17-7-131; Illinois, 725 Ill. Comp. Stat. Ann. sec. 5/115-4(j); Indiana, Ind. Code Ann. sec. 35-36-2-3; Kentucky, Ky. Rev. Stat. Ann. secs. 504.120,130; Michigan, Mich. Comp Law Ann. sec. 768-36; Nevada, Nev. Rev. Stat. sec. 174-035; New Mexico, N.M. Stat. Ann. secs. 31-9-3/4; Pennsylvania, 18 Pa. Cons. Stat. Ann. sec. 314; South Carolina, S.C. Code Ann. sec. 17-24-20; South Dakota, S.D. Code Law sec. 23A-26-14; and Utah, Utah Code Ann. secs. 77-16a-103/104 ("guilty *and* mentally ill"). *See Neeley v. Newton*, supra, 149 F.3d at 1079 n.7.

Taylor v. State, 440 N.E. 2d 1109 (Ind. 1982); *State v. Baker*, 440 N.W. 2d 284 (S.D. 1989). *See also United States ex rel. Weismiller v. Lane*, 815 F. 2d 1106 (7th Cir. 1987) (upholding the Illinois guilty but mentally ill statute); *Neely v. Newton*, *supra*, 149 F. 3d 1074 (10th Cir. 1998) (upholding New Mexico's).

The relevant Illinois statutes—Section 6-2 of the Illinois Criminal Code of 1961, 720 ILCS sec. 5/6-2 (1992), and Section 115-4(j) of the Illinois Code of Criminal Procedure of 1963, 725 ILCS sec. 5/115-4(j) (1992)—are set out in full in Appendix C. They provide first that a person is not criminally responsible for conduct if at the time of such conduct, as a result of a mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.[2] 720 ILCS sec. 5/6-2(a) (1992). The same statute provides that a person who was not insane but was suffering from a mental illness is not relieved of criminal responsibility, and may be found guilty but mentally ill. *Id.* sec. 5/6-2(c). "Mentally ill" or "mental illness," are in turn defined as a "substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior or is unable to conform his conduct to the

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[2] Subsequent to the homicides here, the Illinois legislature amended the definition of insanity to exclude "capacity to conform his conduct to the requirements of the law." Now, a person is insane only if his mental disease or defect prohibited him from appreciating the criminality of his conduct. See 720 ILCS sec. 5/6-2 (1996).

requirements of the law." *Id.* sec. 8-2(d). The defendant has the burden to prove insanity by a preponderance of the evidence. 720 ILCS sec. 5/3-2(b) (1992).[3] A verdict of guilty but mentally ill may be returned, if the jury finds that (1) the State has proven beyond a reasonable doubt that the defendant is guilty of the offense charged, and (2) the defendant has failed to prove his insanity, and "(3) the defendant has proven by a preponderance of the evidence that he was mentally ill . . . ." 725 ILCS sec. 5/115-4(j) (1992).

The only effect of such a verdict is to trigger the mandatory directions to the Illinois Department of Corrections to "cause periodic inquiry and examination to be made concerning the nature, extent, continuance, and treatment of the defendant's mental illness." 730 ILCS sec. 5/5-2-6(b) (1992). The Department of Corrections "shall" provide such treatment "as it determines necessary," and may even transfer such a person to the Illinois Department of Mental Health and Developmental Disabilities. 730 ILCS sec. 5/5-2-6(b,c) (1992).

This, however, is specious, as the Illinois Department of Corrections has that mandatory duty with respect to all its inmates. *See* 405 ILCS secs. 5/1-119, 5/4-500 (1992); 730 ILCS sec. 5/5-2-4 (1992). Indeed, a verdict of guilty but mentally ill does not reflect diminished culpability or criminal responsibility, and a person found guilty but mentally may even be sentenced to death.

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[3] Subsequently to the commission of this offense, the Illinois legislature amended Section 3-2(b) to require a defendant to prove insanity by "clear and convincing evidence." 720 ILCS sec. 5/3-2(b) (1996).

People v. Crews, 122 Ill. 2d 266, 278, 522 N.E. 2d 1167 (1988). After Petitioner was found guilty but mentally ill, the State unsuccessfully sought the death penalty, leaving the only other available sentence of natural life in the penitentiary without parole, and the only other available sentence had Petitioner "merely" been found "guilty." *See* 720 ILCS sec. 5/9-1, 730 ILCS sec 5/5-8-1(c)(ii) (1992).

The violation of due process is twofold. Initially, the concept of guilty but mentally ill promotes compromise verdicts devoid of any substance. A verdict of guilty but mentally ill does not diminish criminal responsibility nor does it limit potential punishment. Instead, it misleads jurors "by encouraging them to think that there is some significant difference between a straight 'guilty' verdict and a verdict of 'guilty but mentally ill,' when there is no such difference." *State v. Neely*, 112 N.M. 702, 714, 819 P.2d 249 (1991) (Montgomery, J., concurring in part & dissenting in part). *See also People v. Ramsey*, 422 Mich. 500, 375 N.W. 2d 297, 305 (1985) (Levin, J., dissenting) (guilty but mentally ill verdict introduces a risk that the jury will be misled as to the meaning of its verdict, "and will decide the issue of criminal responsibility on the basis of speculation and compromise."); *Mitchell v. Commonwealth*, 781 S.W. 2d 510, 514 (Ky. 1989) (Leibson, J., dissenting) ("Few, if any, will realize that the "but mentally ill" finding is, for all practical purposes, empty of legal consequences . . . ."); *People v. Lantz*, 186 Ill. 2d 243, 712 N.E. 2d 314, 324 (1999) (Heiple, J., dissenting) ("GBMI is a meaningless verdict which dupes the jury into believing that there is a middle ground between guilty and not guilty by reason of insanity," and thus

violates due process); *State v. Baker*, 440 N.W. 2d 284, 293 (S.D. 1989) (Henderson, J., dissenting).

"Compromise verdicts" are assuredly a common occurrence in criminal law. Jurors compromise, perhaps, and find a defendant guilty of robbery instead of armed robbery. The list of potential examples is long. The difference, however, from the case at hand is that when such compromises result a defendant is dealt with in a decidedly different manner. The person found guilty of robbery cannot be sentenced remotely similarly to what he would have been sentenced for armed robbery. Such compromises are not improper: they reflect a distinction in the level of criminal responsibility and a distinction in the degree to which a particular level of criminal responsibility is dealt with by our society. Such a "compromise" is non-existent here: the jury is led to believe that it is making some type of distinction between a person who is guilty and one who is guilty but mentally ill, but there is none. They might just as well conclude that a defendant is guilty but well-groomed; it is all one to the defendant. This statutory scheme is infirm because its application results only in misleading the jury to his detriment, by motivating them to believe that they are making a significant finding of fact when there is nothing legally or practically significant about that "fact."

Cases upholding guilty but mentally ill legislation generally cite the following state interests in support of such schemes: reducing the number of persons erroneously found not guilty by reason of insanity, identifying such defendants as in need of psychiatric treatment, and the just sentencing of mentally ill defendants. *See Untied States ex rel. Weismiller v. Lane*, 815 F. 2d 1106, 1110-11

(7th Cir. 1987); *Neely v. Newton*, *supra*, 149 F. 3d at 1080-81. As to the first claim, in the face of a continuum of verdicts of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty, conscientious jurors will "assume that the GBMI verdict represents a distinct and separate position on this continuum." *People v. Robles*, 238 Ill. App. 3d 935, 682 N.E. 2d 194, 205 (2nd Dist. 1997), *rev'd*, *People v. Lantz*, 186 Ill. 2d 243, 712 N.E. 2d 314 (1999). And the opposite danger inures: the stated legislative goal of "reducing the number of persons erroneously found not guilty by reason of insanity" becomes synonymous with increasing the number of person erroneously found guilty but mentally ill who ought to have been found not guilty by reason of insanity.

As to the claimed state interest in identifying inmates in need of mental health treatment, this Court's recent words in *Shannon v. United States*, 512 U.S. 573, 599 (1994), bear noting: "The principle that juries are not to consider the consequences of their verdict is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts, and to decide whether, on those facts, the defendant is guilty of the crime charged." Nothing more, nothing less. Further, a claim that this scheme advances the interest of justly sentencing mentally ill defendants falls of its own weight where no distinction in sentencing exists between the guilty defendant and the guilty but mentally ill defendant. That claim also fails in the absence of any legislative effort to identify those mentally ill defendants who do not plead insanity.

The statutory scheme similarly also violates due process as it distorts the burden of proof by placing upon Peti-

tioner two conflicting burdens. To prove his insanity by a preponderance of the evidence, Petitioner accepted the responsibility to prove that "as a result of a mental disease or mental defect" he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. 720 ILCS sec. 5/6-2(a) (1992). At the same time, in the face of a prosecution request for a guilty but mentally ill verdict, Petitioner was compelled to prove that at the time of the commission of the offense he was "mentally ill." To any juror, those terms are synonymous. The constitutional infirmity is clear: Petitioner, seeking to prove himself insane, is faced with the Hobson's choice of presenting evidence that can be utilized to find him either not guilty by reason of insanity or guilty but mentally ill. Having sought to prove himself insane by proving the existence of a "mental disease or mental defect," he simultaneously proves that he was mentally ill, and has thus enabled the prosecution to have him found guilty but mentally ill rather than not guilty by reason of insanity. "Essentially, in such a circumstance, a defendant has the burden of proving that he did not know what he was doing at the time of the offenses (NGRI), as well as the burden of proving that he knew what he was doing at the pertinent time (GBMI)." *People v. Robles*, *supra*, 236 Ill. App. 2d 935, 682 N.E. 2d 194, 205 (2nd Dist. 1997). *See Speiser v. Randall*, 357 U.S. 543, 524 (1958) ("Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the state has 'proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a

balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.'")

In addition to the numerous and unqualified dissenting opinions noted above, indicative as they are of deep-seated beliefs as to the unconstitutionality of guilty but mentally ill verdicts, commentators are almost universal in their condemnation. *See, e.g.*, Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 Geo. Wash. L.Rev. 494 (1985); McGraw, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of Knowledge*, 30 Vill. L.Rev. 117 (1985); Comment, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 341 (1996); Note, *The Guilty But Mentally Ill Verdict and Due Process*, 92 Yale L.J. 475 (1983).

Fully one-quarter of this nation's states have such laws. These issues necessarily arise in every insanity case in those thirteen states, and they almost always arise in the context of the most serious felonies where a defendant's liberty interests, or even his life, are most at stake. This claim presents an important question of federal constitutional law that has not been, but should be settled by this Court.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

TIMOTHY J. JOYCE
53 West Jackson Boulevard
Suite 1560
Chicago, Illinois 60604
(312) 786-1221

Counsel of Record
for Petitioner

APPENDICES

APPENDIX A

[Dated October 19, 1998]

No. 1-97-0878

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	No. 96 CR 30092
v.	)	
	)	Honorable
MARK ZELAZEK,	)	Reginald Baker,
	)	Judge Presiding.
Defendant-Appellant.	)	

ORDER

Defendant, Mark Zelazek, appeals his conviction of guilty but mentally ill on two counts of first degree murder and his sentence of natural life imprisonment. On appeal, defendant contends the trial court erred in: (1) denying defendant's pre-trial motions to suppress evidence and to suppress statements; (2) giving the jury a guilty but mentally ill instruction; (3) refusing to give the jury a second degree murder instruction; (4) allowing the State to engage in improper and prejudicial arguments; and (5) refusing to find that defendant proved he was insane proved by a preponderance of the evidence. We affirm.

Defendant, Mark Zelazek, was indicted for the first degree murder and armed robbery of Connie Nagel and Ray Wolendowski. The trial court denied defendant's motions to suppress evidence and suppress statements and defendant was tried before a jury. At the close of all the evidence, the trial curt granted motions for directed verdicts of not guilty as to armed robbery and felony murder. The jury found defendant guilty but mentally ill on both counts of first degree murder and defendant was sentenced to natural life imprisonment. Defendant appeals.

First, we consider whether the trial court erred in denying defendant's pre-trial motions to suppress evidence and to suppress statements. The evidence adduced at the pre-trial suppression hearing follows:

On the afternoon of February 6, 1994, the deceased bodies of Connie Nagel and Ray Wolendowski were found inside Nagel's Pub the same day at about 12:30 a.m., according to the investigation of Police Sergeant William Dodaro. Later the same day, at about 6:30 p.m., defendant went to the Dolton Police Station and spoke with Dodaro. Defendant told Dodaro that he had been with them the previous evening at Alf's Pub, that the victims were intoxicated and had been dancing, and that they refused his offer to give them a ride home. Defendant said he has another drink and then went home. Defendant then gave Dodaro his name, address and phone number and left the police station. Shortly after defendant left, Dodaro learned that an individual "appeared to have been bothering" the victims at Alf's Pub and had apparently followed them home. Suspecting the defendant, Dodaro dispatched Sgt. Dubish and Det. Roe to

defendant's home to retrieve defendant for further questioning.

When Dubish and Roe arrived at defendant's home, defendant answered the door and invited them inside. Roe testified he explained why he was there, that he asked defendant to sign a consent to search both defendant's house and car, and that defendant signed the consent in the presence of his mother. Defendant testified he did not sign a consent to search at that time.

Roe further testified that after defendant signed the consent to search, Roe searched defendant's home, but did not immediately search defendant's car because "it was snowy and bitter cold." Roe and Dubish then permitted Dubish defendant to drive the same car to the Dolton Police station and park it where he desired. Roe testified that when he, Dubish and defendant arrived at the police station, Dubish escorted the defendant inside the building. Roe further testified that after their arrival at the police station, he saw two credit cards between the front seats of defendant's car, but was unable to immediately determine to who the credit cards belonged.

Defendant, however, testified that an officer asked him for his car keys after his arrival at the police station, and the officer explained the defendant's car had to be moved because it was parked in the chief's spot. Defendant testified he said he would move the car himself but the officer told him to sit down and that he would take care of it.

Roe, on the other hand, testified that an unnamed officer moved defendant's car into the police garage to facilitate a search.

Dodaro learned that Roe found credit cards belonging to Connie Nagel in defendant's vehicle. Dodaro then confronted defendant with the credit card evidence. Defendant admits he confessed and signed a written statements after this confrontation. Defendant claims, however, that he first signed a consent to search a this time.

A search of defendant's car was conducted the following day. The credit cards belonging to Connie Nagel and other evidence linking defendant to the victims' murders were removed and inventoried.

Two copies of a signed consent to search were admitted into evidence. One lacked the time of consent; the other showed consent at 7:30 p.m. Roe explained that defendant signed the consent at his home but that Roe neglected to fill in the time until a couple of days later. In the interim, the incomplete original document was photocopied and the photocopy which was tendered to the defense.

Defendant's written confession was also admitted into evidence. It states in relevant part, "About one hour after I left the police station, the police came to my house. I allowed them to search my house and signed a consent form so they could search my car. I then drove my car to the Dolton Police Station to talk some more to the police."

On appeal, defendant contends the trial court erred in refusing to suppress evidence and his confession because (1) police conducted a warrantless search of his vehicle without probable cause or his consent; (2) this search resulted in the discovery of Nagel's credit cards, and (3) he did not sign the confession or the consent until he had been confronted with the results of the illegal search of

his car. We disagree. The outcome of the suppression hearing rested upon the credibility of the witnesses. Credibility of witnesses is an issue for the trier of fact and where evidence conflicts a court unless they care clearly erroneous. *People v. Hernandez*, 278 Ill. App. 3d 545, 663 N.E.2d 86, 90 (1996). The trial court believed Roe's testimony that defendant has signed the consent to search for his car while still at his house and that Roe failed to complete the form until later. Because of the credibility determinations of the trial court, the denial of the motions to suppress was not clearly erroneous. Defendant's first contention of error is without merit.

Second, we consider if the trial court erred in giving the jury a guilty but mentally ill instruction. Defendant challenges the constitutionality of the statute providing for a guilty but mentally ill verdict on grounds that it violates due process by imposing upon him conflicting burdens of proof and by encouraging compromise verdicts. While the Illinois Supreme Curt has recently granted a petition for leave to appeal in a second district case which also raises the constitutionality of the guilty but mentally ill statute, see *People v. Robles*, 288 Ill. App. 3d 935, 682 N.E.2d 194 (1997), *petition for leave to appeal granted*, 174 Ill. 2d 586, 686 N.E.2d 1170 (1997), the current authority in the first district holds that it is constitutional, see, *e.g.*, *People v. DeWit*, 123 Ill. App. 3d 723, 463 N.E.2d 742 (1984) and it progeny. In the absence of the Supreme Court's decision in *Robles*, *DeWit* is persuasive and dispositive. Defendant's second contention of error is without merit.

Third, we consider if the trial court erred in not giving the jury a second degree murder instruction. The trial

court is required to give a second degree murder instruction "if there was even slight evidence presented which might legitimately lead a jury to the conclusion that" defendant committed second degree murder. *People v. Mitchell*, 163 Ill. App. 3d 58, 516 N.E.2d 500, 505 (1987). A person commits second degree murder if he or she commits the offense of first degree murder but at the time of the killing was acting under a sudden and intense passion resulting from serious provocation by the individual killed, or believes the circumstances to be such that, if they existed, would justify or exonerate the killing as done in self-defense. 720 ILCS 5/9-2 (West 1995).

"Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(b) (West 1995). Defense counsel contends that because defendant suffered from underdeveloped genitalia and overdeveloped breasts the victims' alleged taunts were sufficient to excite an intense passion in him, and therefore he was entitled to a second degree murder instruction. We disagree. That the victims' alleged taunts excited an intense passion in defendant does not *ipso facto* mean that they would do so in a "reasonable person." Because the teasing and minor physical contact described by defendant were insufficient to excite an intense passion in a reasonable person, the trial court properly denied defendant's request for a jury instruction on second degree murder based on provocation.

Alternatively, a defendant is entitled to a second degree murder instruction based on an unreasonable belief that force was necessary only if the defendant has presented some evidence he unreasonably believed that he acted in self-defense. *People v. Jerome*, 206 Ill. App. 3d 428, 564

N.E.2d 221, 223 (1990). Defense counsel contends defendant subjectively believed he was being sexually assaulted because of his own sexual inexperience. While defendant's sexual inexperience theoretically may have colored his understanding of, the reactions to, the victims' alleged sexual taunts, the record is devoid of any substantive evidence to this effect. That defendant was sexually inexperienced does not *ipso facto* mean that he subjectively believed the victims' actions to be a sexual assault.

Defendant argues, however, "that some evidence existed to permit the jury to conclude that Defendant unreasonably believed it was necessary to defend himself, and he was provoked by a recognizable threat of substantial physical sexual assault." Defendant's argument hinges primarily on the following testimony by Sgt. Dodaro:

> "The defendant was telling us that they were taunting him. They upset him because they wanted him to drink. He didn't want to drink. He stated that they tried to get him into a sexual thing. They were accusing him of being gay, things of that nature."

This evidence is insufficient to warrant a second degree murder instruction. Defendant's statement that the victims "tried to get him into a sexual thing" does not *ipso facto* mean he believed he was in imminent danger of sexual assault.

To bolster his argument, defendant relies upon testimony by defendant's expert witnesses that because of defendant's abnormal physical development the victims' actions made defendant "nervous and scared" and that he feared being sexually assaulted. Defendant's reliance is

misplaced. As defense counsel conceded at the jury instructions conference, "the testimony of expert witnesses cannot, itself, be utilized as substantive evidence to prove that [defendant] acted in a particular manner for a particular reason." See *People v. Denson*, 250 Ill. App. 3d 269, 277-82, 619 N.E.2d 878, 884-86 (1993); *People v. Perez*, 242 Ill. App. 3d 864, 902-03, 610 N.E.2d 1321, 2345-46 (1993) (expert not permitted to express opinion as to defendant's state of mind). Moreover, out of court statements offered by one other than the declarant for proof of the matter asserted are inadmissible hearsay. Accordingly, the testimony of defendant's experts not substantive evidence as to defendant's subjective belief that he was being sexually assaulted.

Because the record is devoid of substantive evidence defendant subjectively believed a danger of sexual assault existed and that stabbing, beating and strangling were necessary to avid that danger, the trial court properly denied defendant's request for a jury instruction on second degree murder based on unreasonable belief in self-defense. Accordingly, defendant's third contention of error is without merit. In so holding, we distinguish this case from on in which a defendant introduces substantive evidence that the victims' actions gave rise to a subjective belief that he or she was the victim of a sexual assault. In such a case, defendant would have been entitled to a second degree murder instruction.

Fourth, we consider if reversible error occurred when the State engaged in alleged improper and prejudicial argument. Defendant contends prosecutors personally attacked defense counsel in rebuttal argument and insinuated that a not guilty by reason of insanity verdict

was tantamount to giving defendant a break and freeing a killer all of which constituted reversible error. We disagree. A prosecutor is allowed a great deal of latitude in closing argument. *People v. Thompkins*, 121 Ill. 2d 401, 531 N.E.2d 38, 57 (1988). Ton constitute reversible error, the complained of comments muse have resulted in substantial prejudice to the accused such that absent those comments the result would have been different. *People v. Morgan*, 112 Ill. 2d 111, 492 N.E.2d 1303, 1311 (1986). Closing arguments of both the prosecution and the defense must be examined in their totality and the comments in question must be placed in their proper context. *People v. Cisewski*, 118 Ill. 2d 163, 514 N.E.2d 970, 976 (1987).

Defendant first argues the prosecutor personally attacked defense counsel by accusing them of "twisting words" and "playing games." We disagree. A review of the prosecutor's argument reveals that the complained of comments were not personal attacks on defense counsel, but criticisms of defense counsel's characterization of the evidence. See *People v. Hooper*, 133 Ill. 2d 469, 552 N.E. 2d 684, 692 (1989) (finding prosecutor's argument defense counsel was "twisting" evidence and "trying to hoodwink" jury was proper).

Defendant next argues reversible error occurred hen the prosecutor argued that a finding of not guilty by reason of insanity was tantamount t giving defendant a break or letting a killer go. We disagree. A review of he prosecutor's argument in context reveals that the "give him a break" comment was invited by defense counsel's argument that a guilty but mentally ill verdict would be a "compromised" or "half backed [sic]" decision, and that

because defendant's actions were "irrational" the jury should find the defendant not guilty by reason of insanity, however unpleasant an unsatisfying" that decision might be. A defendant cannot claim prejudice from a prosecutor's comments that were invited by defendant's argument. *People v. Richardson*, 123 Ill. 2d 322, 528 N.E.2d 612, 625 (1988). Moreover, any error which may have resulted from the prosecutor's "give him a break" comment was cured when the court promptly admonished they jury to "apply the law correctly." As for the prosecutor's argument the jury should not "let the killer go," it was addressed tot he consequence of a not guilty by reason if insanity verdict. Accordingly, defendant's forth contention of error is without merit.

Fifth, and finally, we consider if defendant proved by a preponderance of the evidence that he was insane. Section 6-2 of the Criminal Code of 1961 provides that a defendant may not be convicted if "at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct tot he requirements of the law." 720 ILCS 5/6-2(a) (West 1994). Defendant has the burden of proving that he was not guilty by reason of insanity by a preponderance of the evidence. 720 ILCS 5/6-2(e) (West 1994). "The issue of a defendant's insanity is a question of fact, and the jury's resolution of that issue will not be overturned unless it is contrary to the manifest weight of the evidence." *People v. Johnson*, 146 Ill. 2d 109, 585 N.E.2d 78, 86 (1991). The trier of fact may accept the testimony of one expert over that of another as long as the accepted opinion based on a credible diagnosis. *People v. Hammerli*, 277 Ill. App. 3d 873, 662 N.E.2d 452, 458 (1996).

This is a case of conflicting experts. Defendant presented three expert witnesses to support his claim of insanity; Dr. Edward Blumstein, Dr. Lawrence Henrich, and Dr. Lyle Rossiter. All three deemed defendant legally insane. Dr. Blumstein diagnosed defendant as suffering from "brief reactive psychosis," Dr. Rossiter diagnosed defendant as suffering from "disorganized panic," and Dr. Heinrich diagnosed defendant was suffering from an "acute psychotic reaction." Each of these diagnoses was discredited on cross-examination and by the State's expert witnesses. None of the clinical diagnoses of defendant's experts are recognized by the current Diagnostic and Statistical Manual, DSM IV, drafted by the American Psychiatric Association and recognized by the courts (*People v. Wilhoite*, 228 Ill. App. 3d 12, 592 N.E.2d 48, 55 (1991)). Further, inconsistencies in the testimony of the defense experts regarding whether defendant's behavior was organized or disorganized undercut their credibility.

The State's expert witnesses, Dr. Edward Mahoney and Dr. Matthew Markos, testified that the evidence showed defendant appreciated the criminality of his conduct. Dr. Mahoney testified that defendant exhibited organized, goal oriented behavior intending to hide the evidence when he moved from the first to the second victim, wiped blood from himself and the wall, took the victims' bloody clothes, disposed of them in two separate dumpsters, and lied about the killings. Dr. Markos testified that such goal oriented behavior was inconsistent with the defendant being unable to appreciate the criminality of conduct. Further, both of the State's expert witnesses testified that the defendant could have conformed is conduct to the requirements of the law. The jury's ac-

ceptance of the diagnoses of the State's experts over the diagnoses of the defendant's experts was not contrary to the manifest weight of the evidence. Accordingly, defendant's fifth contention of error is without merit.

Affirmed.

O'BRIEN, P.J., with TULLY, J., and O. FROSSARD, J., concurring.

APPENDIX B

(Letterhead of)

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 2, 1999

Mr. Timothy J. Joyce
Attorney at Law
53 W. Jackson Blvd., S#1560
Chicago, IL 60604

No. 86748 – People State of Illinios, respondent, v. Mark Zelazek, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 24, 1999.

APPENDIX C

Illinois Criminal Code of 1961, Section 5/6-2, 780 ILCS sec. 5/6-2 (1992):

Insanity. (a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) The terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill.

(d) For purposes of this Section, "mental illness" or "mentally ill" means a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior or is unable to conform his conduct to the requirements of law.

(e) When the defense of insanity has been presented during the trial, the burden of proof is on the defendant to prove by a preponderance of the evidence that the defendant is not guilty by reason of insanity. However, the burden of proof remains on the State to

prove beyond a reasonable doubt each of the elements of each of the offenses charged, and, in a jury trial where the insanity defense has been presented, the jury must be instructed that it may not consider whether the defendant has met his burden of proving that he is not guilty by reason of insanity until and unless it has first determined that the State has proven the defendant guilty beyond a reasonable doubt of the offense with which he is charged.

Illinois Code of Criminal Procedure, Section 5/115-4(j), 725 ILCS sec. 5/115-4(j) (1992:

Unless the affirmative defense of insanity has been presented during the trial, the jury shall return a general verdict as to each offense charged. When the affirmative defense of insanity has been presented during the trial, the court shall provide the jury not only with general verdict forms but also with a special verdict form of not guilty by reason of insanity, a to each offense charged, an in such event the court shall separately instruct the jury that a special verdict of not guilty by reason of insanity may be returned instead of a general verdict but such special verdict requires a unanimous finding by the jury that the defendant committed the acts charged but at the time of the commission of those acts the defendant was insane. In the event of a verdict of not guilty by reason of insanity, a hearing shall be held pursuant to the Mental Health and Developmental Disabilities Code 1 to determine whether the defendant is subject to involuntary admission. When the affirmative defense of insanity has been presented during the trial,

the court, where warranted by the evidence, shall also provide the jury with a special verdict form of guilty but mentally ill as to each offense charged and shall separately instruct the jury that a special verdict of guilty but mentally ill may be returned instead of a general verdict, but that such special verdict requires a unanimous finding by the jury that: (1) the State has proven beyond a reasonable doubt that the defendant is guilty of the offense charged; and (2) the defendant has failed to prove his insanity as required in subsection (b) of Section 3-2 of the Criminal Code of 1961, as amended, and subsections (a), (b) and (e) of Section 6-2 of the Criminal Code of 1961, as amended; and (3) the defendant has proven by a preponderance of the evidence that he was mentally ill, as defined in subsections (c) and (d) of Section 6-2 of the Criminal Code of 1961, at the time of the offense